**HUI VUI CHUNG & ORS**

**v.**

**SYKT HING LEE SDN BHD**

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[SUIT NO: S 172 OF 1984]
18 SEPTEMBER 1997

***CIVIL PROCEDURE:*** *Action - Cause of action - Accrual of*

***CONTRACT:*** *Building contract - Delay - Compensation for delay in delivery - Whether there was delay on the part of the purchasers - How damages to be computed*

This was an action by the plaintiffs suing for themselves and on behalf of all the other purchasers and owners of various units of buildings for liquidated damages arising from breach of contract by the defendant for delay in the delivery of the units. It should be noted that eventually the buildings were completed in 1986 and the purchase prices had been settled in the same year when the occupation permits were issued. The plaintiffs therefore were interested in pursuing for compensation for delay in delivery as provided for in the agreements.

Among the issues for consideration were: (a) when did the plaintiffs' right to sue actually arise; (b) whether the defendant's excuse for the delay ought to be considered; (c) how damages were to be computed; and (d) whether there was any delay on the part of the plaintiffs.

**Held:**

**[1]** It is a principle of law that a contract must be construed reasonably – by the words used and also with reference to the surrounding circumstances. The law will always look beyond the terminology of the agreement to the actual facts of the situation – and not just the label attached to.

**[1a]** In this case, since the defendant had failed to complete the buildings within the time prescribed in the sale and purchase agreement, there was therefore a breach of contract entitling the purchasers to claim compensation. As there was no dispute that the plaintiffs had paid up according to the schedule of payments contained in the sale and purchase agreements at the time of commencing this action and at the time the buildings were not completed although the completion date had passed,

the plaintiffs were therefore entitled to commence an action for breach of contract.

**[2]** The defendant's excuse for the delay was that it was in financial difficulties at that time. Such an excuse however could not be entertained as it had not been accommodated in the sale and purchase agreement.

**[3]** According to the sale and purchase agreements, the agreed compensation was for the failure of the defendant to deliver vacant possession of the buildings within the agreed stipulated date. The rate stipulated as compensation in the sale and purchase agreements was not unreasonable bearing in mind that the defendant undertook to complete the buildings within a given period.

**[4]** There was no evidence of delay in the installment or progress payments on the part of the plaintiffs. The plaintiffs therefore were entitled to claim damages for the delay in the completion of the buildings. However, the precise sum should be assessed in accordance with the formulae stipulated in the agreement.

*[Claim allowed.]*

**Cases referred to:**
*Anjalai Ammal & Anor v. Abdul Kareem [1969] 1 MLJ 22* ***(cit)***
*Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625* ***(refd)***
*Hillas Ltd v. Arcos Ltd [1932] All ER 494* ***(cit)***
*Lloyds v. Harper [1880] 16 Ch D 290* ***(foll)***
*Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1984] 2 MLJ 280* ***(foll)***
*Prenn v. Simmonds [1971] 3 All ER 237* ***(foll)***
*Sio Koon Lin & Anor v. SB Mehra [1981] 1 MLJ 225 FC* ***(cit)***
*Woo Yew Chee v. Yong Yong Hoo [1979] 1 MLJ 131* ***(foll)***

**Legislation referred to:**
Contracts Act 1950, s. 75

*For the plaintiffs - David Wong (Francis Wong with him); M/s Peter Lo & Co*
*For the defendant - Edwin Tsen; M/s Tan Pang Tsen & Co*

## JUDGMENT

**Richard Malanjum J:**

### *Introduction*

This is an action by the plaintiffs suing for themselves and on behalf of all other purchasers and owners of various units of buildings in the project known as Hing Lee Villa, Sandakan, primarily for liquidated damages arising from breach of contracts allegedly by the defendants.

The prayers sought for in the statement of claim are thus (verbatim):

(a) Liquidated damages in the respective sums calculated at the rate of 1/2 % per month on the respective amounts received by the defendants from date the terrace houses and shop lots should have been completed but not until the actual date of completion;

(b) Interests charged by the Bank for the housing loans;

(c) Specific performance of the contracts namely, the completion of the said terrace houses or shophouses forthwith;

(d) General damages;

(e) Costs;

(f) Such other relief as the court deems fit.

However, prayer (c) is no longer relevant as it is not in dispute that the buildings were completed in 1986. As for the others they will be dealt with in the course of this judgment.

***The Action***

When this case came up for hearing both the learned counsel for the parties agreed not to call any witness. Instead, they jointly handed to the court a Statement of Agreed Facts ('AF') and the Agreed Issues to be tried ('AI'). Then it was followed by their respective submissions. Hence, it is therefore appropriate that "AF" and "AI" should be reproduced in toto.

**Agreed Facts (AF)**

1. That the 1st Plaintiff and the Defendant executed the Sale & Purchase Agreement dated 21/05/79;

2. That the 2nd Plaintiff and the Defendant executed the Sale & Purchase Agreement dated 17/05/79;

3. That the 3rd Plaintiff and the Defendant executed the Sale & Purchase Agreements dated 03/07/79 and 08/04/80;

4. That the names as appeared on pages 6 to 10 of the Statement of Claim are purchasers of the respective units as stated therein;

5. That the contents of the Sale & Purchase Agreements between the purchasers mentioned in paragraph 4 hereinabove and the defendants are the same as the agreements in paragraph 1, 2, and 3 hereinabove save as to the following:

(a) the type of building;

(b) the unit number (address);

(c) the area of the unit;

(d) the purchase price and the deposit paid or payable; and

(e) the date of the agreement.

6. That as of the date of the Writ, namely, 09/11/84, the contracted dwelling houses and shoplots were not completed;

7. That Temporary Occupation Certificate was issued on 20/05/86;

8. That as of the date of the Writ, namely, 09/11/84, the full purchase price of the units of dwelling houses and shoplots have not been paid.

It should also be added that the whole of the purchase prices had been settled in 1986 when the temporary occupation permits were issued.

**Agreed Issues To Be Tried**

i. Have the Plaintiffs a cause of action against the Defendants when they have not yet paid the full purchase price to the defendants under clause 11 of the said agreement when the writ was issued?

ii. If the answer is in the affirmative, whether the Defendants was in breach of the Sale & Purchase Agreements in failing to deliver the dwelling houses and shoplots within the 24 months period provided in the said agreements?

iii. If the answer is in the affirmative, whether the Plaintiffs are entitled to the damages claimed for the delay in the delivery of the units of dwelling houses and shoplots?

iv. Are the Defendants entitled to counterclaim and set-off any loss payable to the Plaintiffs in the event the Court finds the Defendants liable to pay the liquidated damages under clause 11?

In his final submission it was also apparent that the learned counsel for the plaintiffs was only interested in pursuing for the compensation pursuant to cl. 11 of their Sale and Purchase Agreements ('the Sale and Purchase Agreements') entered into by his clients with the defendants. In fact the submissions of both the learned counsel for the respective parties revolved on the issue of whether any compensation could be claimed under that clause. That should mean that only prayer (a) and prayer (e) are to be considered. As there was no evidence led or argument advanced on the other prayers, I should therefore consider them as abandoned.

***The Agreed Issues To Be Tried***

***Issue (i)***

This issue involves the interpretation of cl. 11 of the Sale and Purchase Agreements which reads:

> "The Vendors undertake to complete the construction of the said dwelling-house within twenty four (24) months of working days from the date hereof. Provided that should there be any delay in completion within the stated period the Vendors shall pay to the Purchaser compensation by way of liquidated damages and not in the nature of a penalty at the rate of half per centum (1/2%) per full month of delay on the amount received by the Vendors.
>
> PROVIDED that the Purchaser shall have fully paid the purchase price to the Vendors in accordance with the Schedule of Payments before any compensation under this Clause is liable to be paid by the Vendors.

And although the plaintiffs and the other purchasers and owners respectively bought different types of buildings, cl. 11 is common in all their Sale and Purchase Agreements.

Learned counsel for the plaintiffs contended that the plaintiffs' action was founded on contract. As such the plaintiffs' right to sue derives from the Defendants' breach of contract which in this case the failure to deliver vacant possession within the agreed period of twenty four (24) months.

On the other hand, learned counsel for the defendants submitted that the right to sue should only arise after the actual purchase price had been fully paid. In this case it was not in dispute that at the time of commencing the action the final payments of the purchase price had not been paid. However, the simple reason was that the buildings were yet to be completed.

Now, it is a principle of law that a contract must be construed reasonably. "It must be construed by the words used but also with regard to the surrounding circumstances." (See: *Lloyds v. Harper* [1880] 16 Ch. D 290; *Prenn v. Simmonds* [1971] 3 All ER 237). Further, it is "now well known that the law will always look beyond the terminology of the agreement to the actual facts of the situation" and not just the label attached thereto. (See: *Woo Yew Chee v. Yong Yong Hoo* [1979] 1 MLJ 131).

Having therefore carefully considered cl. 11, particularly the proviso thereof, I am inclined to agree with the learned counsel for the plaintiffs that compensation is payable provided payment has been made to the defendants in accordance with the schedule of payments contained in the Sale and Purchase Agreements. In my view the phrase "in accordance with the schedule

of payments" found in the proviso of cl. 11 limits or qualifies the effect of the words "fully paid the purchase price to the Vendors" therein. I would have probably thought otherwise if the phrase was not there. And that being my interpretation of the proviso, it cannot therefore be said that the plaintiffs had no cause of action when they commenced this action.

I am fortified in my conclusion by the views expressed by their Lordships in the Federal Court and the Privy Council in the case of *Loh Wai Lian v. SEA Housing Corporation Sdn. Bhd.* [1984] 2 MLJ 280 and [1987] 2 MLJ 1 respectively. In both courts it was viewed that due to the failure of the developer to complete the buildings within the time prescribed in the agreement there was therefore a breach of contract entitling the purchasers to claim for compensation.

His Lordship, Lord Oliver of Aylmerton, in the Privy Council said this at p. 4:

> The whole tenor of the clause is, in their Lordships' view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered. If the question is asked "in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?", the answer is plainly the date of which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided.

In that case the court were considering cl. 17 of a contract which reads:

> Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this Agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

And although what was also said appears to be along the argument of the defendants in this case, I think such portion of the view came about due to the phrase "from such aforesaid date to the date of actual completion and

delivery of possession of the said building to the purchaser" as found in cl. 17 of the Contract. There is no equivalent phrase found in cl. 11 of the Sale and Purchase Agreements in the present case. Hence, that part of the view expressed is quite irrelevant.

As there was no dispute that the plaintiffs had paid up according to the schedule of payments contained in the Sale and Purchase Agreements at the time of commencing this action and at that time the buildings were not completed although the completion date had passed, the plaintiffs were therefore entitled to commence an action for breach of contract. Thus, my answer to Issue (i) is in the affirmative.

***Issue (ii)***

In view of what I have said under Issue (i) the answer to this Issue has to be in the affirmative.

The basic defence put up by the defendants for the delay is that they were in financial difficulties at that time. With respect, I do not think such an excuse has been accommodated in the Sale and Purchase Agreements. As was said in *Charles Grenier Sdn. Bhd. v. Lau Wing Hong* [1996] 3 AMR 3533 FC that a court of law tends to lean in favour of up-holding a bargain. Hence, there is no reason to allow the defendants in this case to rely on an excuse which was not agreed or provided for when the transaction was concluded. (See also: *Hillas Ltd. v. Arcos Ltd.* [1932] All ER 494).

Learned counsel for the defendants also submitted that "in part, the plaintiffs contributed to the delay by failing to pay the instalments in accordance with the terms of the agreement". This contention was based on the assumption that the plaintiffs were late in their progress payments. Reference was made to the Agreed Bundle of Documents (AB) at pp. 6 to 77 to substantiate the assertion.

In rebuttal, learned counsel for the plaintiffs contended that there was no evidence of late payments by the plaintiffs. He said that the documents relied upon did not show delay in payment but only the date of payment and the amount paid. There was no indication of when the payment should have been made. Instead the documents showed that the plaintiffs did pay to the defendants the sums equivalent to 90% - 95% of the total purchase price and in excess of the schedule of payments prior to the commencement of this action.

After perusal of the documents referred to I agree with the learned counsel for the plaintiffs that there is nothing to show that there was a delay on the part of the plaintiffs in making their payments under the schedule of payments. There are dates written on those documents. But no one came to explain their significance. And on their own those dates are meaningless. Further, there was no document shown that indeed the plaintiffs had delayed their payments and that the defendants had demanded interest for the delay. Such a document would have been helpful in ascertaining whether there was indeed a delay. Of course there are standard letters written to some of the plaintiffs reminding them to pay up (AB pp. 166, 171, 182, 195, 222, 232, 233, 235, 237, 255, 257, 261, 262, 269, 270, 273, 274, 285 and 301). But these letters were sent giving the addressees due dates to pay up. Whether or not they complied with the letters was left unanswered. In any event, from the contents of those letters, I do not think the defendants should now be permitted to claim interest for the delay, if any, prior to the issuance particularly if the addressees complied with the request. Nothing in the letters to reserve such right. And the relevant clauses relied upon by the defendants (cls. 8(b) and 30 of the Sale and Purchase Agreements) did not make it mandatory for interest to be paid for any delay regardless of any subsequent payments. In short, I agree with the learned counsel for the plaintiffs that the defendants should be estopped from making the claim. Hence, I am not satisfied that the defendants have established their assertion on the balance of probabilities. Accordingly, I find the assertion to be without any substance.

And obviously scrapping the bottom, learned counsel for the defendants proceeded to raise the issue of condonation on the part of the plaintiffs. He submitted that inspite of the delay in the completion of the buildings the plaintiffs paid the last instalments thereby condoning the delay. As such he said that they should not be entitled to any damages.

Now, the issue of condonation was not pleaded in the amended statement of defence. Thus, this court is not in the position to consider it. (See: *Anjalai Ammal & Anor. v. Abdul Kareem* [1969] 1 MLJ 22). And that should dispose of the issue.

But in the event that I am wrong and that issue should be considered, I also find it to be baseless. There was no question of the Sale and Purchase Agreements being terminated by the plaintiffs upon the failure of the defendants to complete the buildings on the due dates and proceeding to claim for damages. There was no necessity for that in view of cl. 11 thereof. Thus, the plaintiffs had the obligation to continue to observe the terms therein, including the Schedule of Payments. In fact, what the plaintiffs did was purely to comply with the terms of the Sale and Purchase Agreements.

***Issue (iii)***

Since the answers to Issues (i) and (ii) are in the affirmative, for this Issue (iii) it is also in the affirmative. In fact cl. 11 of the Sale and Purchase Agreements has already provided the formulae in computing the damages payable.

Learned counsel for the defendants in his typical style of being either ambiguous or confused, at first submitted that the parties were bound by the terms of the Sale and Purchase Agreements, including cl. 11. He said that the plaintiffs should not be entitled for other compensation in excess of what was stipulated therein. He even cited s. 75 of the Contracts Act 1950 to support his contention. I think that goes without saying as judging from the submission of the learned counsel for the plaintiffs he was only interested in prayer (a) of the statement of claim. But the next thing the learned counsel for the defendants said, without any elaboration or explanation or that it was in the alternative, was that the plaintiffs had not proved their loss and thus, not entitled to claim for any damages. Not satisfied with that, he shifted to another position, saying that the 'calculation of compensation should be based on the actual payment made from time to time and not on the lump sum paid prior to the issuance of the writ. If that is the case the plaintiffs would be unjustly enriched.'

As to the first limb of that submission the agreed facts should be sufficient to rebut it. There was no doubt that the buildings were not completed before the due dates as stipulated in the Sale and Purchase Agreements. And as such cl. 11 thereof is very clear in dealing with the obligation of the defendants due to the delay. It is therefore obvious that the loss suffered by the plaintiffs was their deprivation of the buildings from the dates as agreed.

In respect of the second limb I think the learned counsel for the defendants had answered it in his earlier submission. It was agreed under cl. 11 that the defendants would pay the plaintiffs 'compensation by way of liquidated damages and not in the nature of a penalty at the rate of half per centum (1/2%) per full month of delay **on the amount received**' by the defendants. (Emphasis added). I find it difficult to interpret that clause other than what it means. Nothing in the clause to say that compensation is payable only for the delay in the completion of each stage of the construction of the buildings. Neither is there anything to indicate that the compensation payable is based on the sums received from time to time. The agreed compensation is for the failure of the defendants to deliver vacant possession of the buildings within the agreed stipulated dates. Thus, I find no merit in the argument of the learned counsel for the defendants. He spoke of unjust enrichment of the plaintiffs. But he omitted to consider that the plaintiffs had in fact paid the defendants

for works completed according to the Schedule of Payments yet they had no buildings delivered to them duly completed within the agreed period. In short, learned counsel seemed to think that it was alright for the defendants to have the use of all the payments received but the plaintiffs should not be allowed to claim compensation based on what they had paid. I find that unfair.

In any event I do not find the rate stipulated in cl. 11 payable as compensation to be unreasonable bearing in mind that the defendants undertook to complete the buildings within a given period. It should also be safe to assume that the delay had surely caused loss and inconvenience to the plaintiffs.

Finally, I will deal with the actual sums payable as compensation at the conclusion of this judgment.

***Issue (iv)***

On this issue the defendants relied on cll. 8(b) and 30 of the Sale and Purchase Agreements. They read:

> For cl. 8(b): If the Purchaser fails or refuses or neglects to accept the loan referred to in cl. 4 and/or if the Purchaser defaults in duly complying with the necessary requirements for the application and/or acceptance and/or finalisation of the loan as a result of which the loan is withdrawn by the said Finance Company then in every such case it is hereby agreed that cl. 4 hereof is deemed to be discharged and the purchaser shall then be liable to pay forthwith to the vendors the whole of the purchase price together with interest thereon at the rate of twelve per centum (12%) per annum from the date of the expiry of the fourteen (14) days' notice referred to in cl. 33.
>
> For cl. 30: In the event of the Purchaser failing to make any of the payments stated in this Agreement on the respective due dates the Vendors shall be entitled to charge interest on each of the late payments calculated at the rate of twelve per centum (12%) per annum from such due date to the date of payment.

As it is my finding hereinabove that there was no evidence of delay in the instalment or progress payments on the part of the plaintiffs there is therefore no question of any claim for interest due to delay. My answer to this Issue is therefore in the negative.

Learned counsel for the plaintiffs also raised the issue of limitation to resist the claim of the defendants for set-off. In view of my earlier finding I do not think it is necessary for me to deal with it in greater details. Suffice it to say that any amendment to a pleading takes effect from the date of filing the particular pleadings. (See: *Sio Koon Lin & Anor v. S.B. Mehra* [1981] 1 MLJ

225 FC). Thus, although the claim for interest by way of set-off was added only lately by the defendants it should be deemed made when the statement of defence was filed.

***Conclusion***

On the basis of my findings on the Agreed Issues to be Tried (AI), the plaintiffs are therefore entitled to claim damages for the delay in the completion of the buildings pursuant to cl. 11 of the Sale and Purchase Agreements. Hence, prayer (a) of the statement of claim is granted. However, as to the precise sum each of the plaintiffs will receive, that should be properly computed or assessed in accordance with the formulae stipulated in cl. 11 thereof. I am not prepared to accept the summary supplied by the learned counsel for the plaintiffs at the conclusion of his submissions. It is only fair that the defendants should be allowed to counter-check the figures given therein before they are accepted. Thus, I therefore direct that the computation or assessment of the sums payable be held before the Deputy Registrar, High Court, Sandakan.

And as indicated earlier, prayers (b), (c) and (d) are hereby refused. The buildings were completed in 1986 and thus prayer (c) becomes irrelevant. As for prayers (b) and (d) there was no evidence adduced to justify them.

The plea of set-off by the defendants is also rejected for the reasons given hereinabove.

Finally, I award costs for this action to the plaintiffs to be taxed unless agreed.

*Reported by Mariette Peters-Goh*